77-1656

IN THE

Supreme Court of the United States

No. A-842

COMMONWEALTH OF PENNSYLVANIA,

vs.

JOSEPH F. BIANCONE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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CONSTITUTIONAL & STATUTORY PROVISIONS.

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

v.

JOSEPH F. BIANCONE,

Petitioner.

No. A-842

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Joseph F. Biancone, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania entered in this matter on 29 June 1977.

I. Opinion Below

The opinion of the Superior Court, dated 29 June 1977, together with the dissenting opinion of Messrs Justice Hoffman, Cercone and Spaeth are reported at 375 A.2d 743, and are reproduced in the Appendix hereto. The Orders of the Supreme Court of Pennsylvania denying Petitions for Allowance of Appeal and for Reconsideration are not yet reported, and the docket entries of said Court are reproduced in the Appendix hereto reflecting same.

II. Jurisdiction

The Order of the Supreme Court of Pennsylvania denying a Petition for Reconsideration was entered on 22 December 1977. An Order extending time to file Petition for Certiorari was entered by Your Honorable Court, by Mr. Justice William J. Brennan, on 6 April 1978, extending such time to and including 21 May 1978. This Petition is being timely filed. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257.

III. Questions Presented

1. Did the Trial Court err in refusing Petitioner's request for a mistrial after the Commonwealth elicited the testimony of its witness Charles McCreary that marijuana was found on Petitioner's premises.

2. Did the Trial Court err in failing to suppress certain evidence seized pursuant to a constitutionally infirm search warrant.

IV. Constitutional & Statutory Provisions

AMENDMENT IV—SEARCHES & SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, SECTION 1—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(3)—CERTIORARI

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

V. Statement of the Case

On 19 December 1973, a search warrant was issued for the home of the Petitioner, Joseph Fred Biancone, by District Justice Wallace Luckenbill. Thereafter, on 20 December 1973, a second search warrant was issued by District Judge Henry Schultz for the premises of the same Petitioner. Pursuant to a search conducted about 8:30 p.m. on 19 December 1973, two rifles were found and seized and, further, the police found a certain .410 shotgun pistol but did not seize the same. This search was conducted by the Pennsylvania State Police. A further search was conducted on 20 December 1973, pursuant to a search warrant, and nothing was seized. Joseph Fred Biancone was indicted on 7 August 1974 on the charges of Receiving Stolen Property and Aiding Consummation of Crime.

An application to suppress evidence was filed and denied by the Court on 8 October 1974.

Trial was thereafter held on 21 October 1974 before the Honorable Judge Frank E. Reed, specially presiding, and a jury. On 22 October 1974, a verdict of guilty was rendered and post verdict motions were thereafter filed. The motions for a new trial and in arrest of judgment were argued, at the conclusion of which the Trial Judge denied the same. Subsequently, the Petitioner was sentenced on both indictments.

An appeal was taken to the Superior Court of Pennsylvania (October Term, 1974, Number 1295), whereupon the convictions were affirmed, three Justices dissenting, on 29 June 1977. A timely Petition for Allowance of Appeal was filed in the Supreme Court of Pennsylvania (Allocatur Docket Number 3129), which Petition was denied, per Curiam, on 14 October 1977. A Petition for Reconsideration was filed in the same Court, and denied, *per Curiam*, on 22 December 1977.

On 6 April 1978, this Court per Mr. Justice William J. Brennan, Jr., extended the time in which to file the instant Petition for Writ of Certiorari to and including 21 May 1978.

VI. REASONS FOR GRANTING THE WRIT

The Trial Court erred in refusing Petitioner's request for a mistrial after the Commonwealth elicited testimony that marijuana was found on Petitioner's premises.

One of the witnesses produced at trial by the Commonwealth was Charles A. McCreary, a Pennsylvania State Police trooper. On direct examination, the witness testified that a shotgun pistol was discovered in the suspended ceiling of Petitioner's bedroom. During the course of this examination, the following colloquy occurred between the witness and the District Attorney:

Q. Was anything else up there?
A. Yes.
Q. What?
A. There was a bag of what appeared to be marijuana.

This testimony evoked an immediate motion for a mistrial by defense counsel.

Petitioner submits that it was prejudicial error to deny the motion for a mistrial. The purpose and effect of the testimony quoted above was to permit the jury to hear an allegation of criminal conduct wholly irrelevant to the matter being tried. Petitioner was indicted and charged only with receiving stolen goods and aiding the consummation of a crime. He was not charged with possession of a controlled substance, or with any offense that is even remotely drug-related.

The effect of this testimony was highly prejudicial in that the jury was permitted, and in fact invited, to infer therefrom that Petitioner was an individual of generally bad character, having a propensity toward criminal activity of varying sorts. Furthermore, the Court compounded its error by failing to immediately give a curative instruction to the jury. That Petitioner's due process rights under the Fifth and Fourteenth Amendments were thereby infringed needs little argument.

In *Hall vs. United States*, 419 F.2d 582 (5th Cir. 1969), an unsupported accusation charging the defendant with a separate and serious criminal offense was found to be improper. And in a closely analogous situation to the instant matter, the Eight Circuit held in *United States vs. Knight*, 535 F.2d 1059 (8th Cir. 1976) that the Trial Court erred in a prosecution for possession of stolen goods by allowing references to the possession of other goods not shown to be stolen, thereby casting suspicion on the defendant. Despite the existence of sufficient evidence of guilt in that case, the Court nevertheless reversed the conviction and remanded for a new trial. Because of the highly prejudicial nature of the testimony, and the apparently deliberate effort by the prosecutor to elicit the same, Petitioner respectfully submits that a similar result should obtain here, *i.e.* that a new trial be ordered. The error of the Trial Court can not be said to have been harmless beyond a reasonable doubt.

The Trial Court erred in failing to suppress evidence seized pursuant to a constitutionally infirm search warrant.

It is well established that to be valid, a search warrant must contain a complete description of the premises to be searched. The description is sufficient if the officer executing the warrant can, with reasonable effort, ascertain and identify the place to be searched. *Moore vs. United States*, 461 F.2d 1236 (D.C. Cir. 1972); *United States vs. Rollins*, 271 F. Supp. 18 (E.D. Tenn. 1966); *United States vs. Pisano*, 191 F. Supp. 861 (SDNY 1961).

In the instant case, the description was as follows:

> A 2½ story stone and aluminum siding (home) located on Antietam Road, Lower Alsace Township.

This description was inaccurate in several respects. First, the premises searched were not located on Antietam Road, but rather, some three miles away, near Angora Road. Second, testimony adduced at trial disclosed that there were several houses on Antietam Road, and two houses on Angora Road, all of which could have met the description quoted above. Finally, although the description also stated that a spring-house was located on the grounds, no such spring-house in fact existed. It is therefore submitted that the description of the subject premises was insufficient to meet the rigorous demands established by the Courts, and that the resulting search was conducted in violation of Petitioner's rights guaranteed by the Fourth and Fourteenth Amendments.

VII. Conclusion

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court below.

Respectfully submitted:

LEE MANDELL,
Lee Mandell,
Attorney for Petitioner.

APPENDIX

No. 14 E.D. Miscellaneous Docket No. 1978

14

COMMONWEALTH OF PENNSYLVANIA,

v.

JOSEPH F. BIANCONE,

Petitioner.

Court Below: C.P.—Criminal

County: Berks

No. Below: 753 & 753A
Superior Court No. 1295
Oct. Term, 1975
No. 3129 Allocatur Docket

ATTORNEY FOR PETITIONER

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ATTORNEYS FOR RESPONDENTS

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Reading, Pa. 19601

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Special Deputy Attorney General
Commonwealth of Pennsylvania
132 North 8th Street
Reading, Pa. 19601

Appendix—No. 14 E.D. Miscellaneous Docket No. 1978.

Date	Filings-Proceedings
1/19/78	Petition for Bail Pending Consideration of a Petition for Writ of Certiorari to the United States Supreme Court, filed.
2/1/78	Answer of Charles A. Haddad, Esq., filed.

ORDER

2/16/78.

Petition granted. Bail in the amount of $10,000 to be entered with surety to be approved by the Trial Court.

s/ M. J. EAGEN,
Chief Justice.

2/21/78 Certified copy of above Order exit to Clerk, Criminal, Berks County.

ORDER

AND NOW, this 21st day of March, 1978, the order of this Court dated February 16, 1978, granting petition of Joseph F. Biancone for bail pending consideration of a petition for Writ of Certiorari to the United States Supreme Court, is hereby vacated.

BY THE COURT:
s/ M. J. EAGEN,
Chief Justice.

Appendix—No. 14 E.D. Miscellaneous Docket No. 1978.

No. 3129 ALLOCATUR DOCKET

JOSEPH F. BIANCONE,

Petitioner.

v.

COMMONWEALTH OF PENNSYLVANIA.

P.A. ~~5845~~
East. District

FOR PETITIONER:	FOR RESPONDENT:
William R. Bernhart, Esq.,	Charles Haddad
38-44 N. 6th Street	529 Court Street
Reading, Pa. 19601	Reading, Pa. 19601

July 28, 1977. Petition for Allowance of Appeal from Superior Court at No. 1295 October Term 1975, filed.

August 3, 1977. Record, filed.

ORDER

October 14, 1977
Petition denied
Per Curiam

October 31, 1977. Record, remitted.

November 1, 1977. Petition for Reconsideration filed.

ORDER

December 22, 1977
Petition denied
Per Curiam

December 27, 1977. Record, remitted.

(Handwritten material illegible.)

Opinion

IN THE SUPERIOR COURT
OF PENNSYLVANIA

J. 1036/1975

COMMONWEALTH OF PENNSYLVANIA,

vs.

JOSEPH F. BIANCONE,

Appellant.

No. 1295 October Term, 1975

Appeal from the Judgment of Sentence of the Court of Common Pleas of Berks County, Nos. 753 and 753a of 1974.

Opinion by Watkins, *P.J.* Filed Jun 29, 1977

Appellant, Joseph F. Biancone, was charged with receiving stolen property and aiding consummation of a crime. The stolen property consisted of guns and rifles. He was tried before Judge Reed, specially presiding, and a jury, and was found guilty of the charges. Appellant was sentenced to imprisonment for not less than one year nor more than two years and a fine of $2,500.00.

In this appeal, several issues are raised. Appellant's first contention is that the court below erred in denying his motion for a mistrial based on the following testimony by a state policeman who participated in a search of the appellant's premises pursuant to a search warrant.

"Q. Did you make a search of the entire premises of Mr. Biancone's house?

"A. Yes, sir.

"Q. Will you tell us what else you saw and did in the course of that search?

"A. During the course of the search, I had occasion to search a suspended ceiling, the new grid type of suspended ceiling, where there are metal grids suspended from the ceiling, and there are panels placed on top of those grids. I lifted up one of the panels and looked inside. In there I found a 410 gauge shotgun pistol . . .

"Q. Was anything else up there?

"A. Yes, sir, there was.

"Q. What?

"A. There was a bag of what appeared to be marijuana."

Appellant's counsel objected to the answer, and the court sustained the objection. Appellant also moved for a mistrial on the ground that the answer was highly inflammatory. The motion was denied, and we agree that this was proper.

Appellant contends that the answer of the state policeman that he found what appeared to be marijuana was at the "insistence and request" of the Assistant District Attorney. The record does not support appellant's characterization of the answer. The state policeman also found money above the panels which belonged to the appellant, and he testified to this immediately after his testimony about the marijuana. When the prosecutor asked the police officer what else was above the panels, he might have anticipated that the officer's answer would have been that money was also above the panels. The record does not reveal a deliberate attempt by the prosecution to bring in evidence of a substance that might be marijuana.

The decision whether to declare a mistrial is within the sound discretion of the trial judge and will not be reversed

unless there is a flagrant abuse of discretion. *Commonwealth v. Conti,* 236 Pa. Superior Ct. 488, 345 A. 2d 238 (1975). We do not believe that the court below abused its discretion in refusing to grant a mistrial. It must be noted that the police officer did not state that he found marijuana above the ceiling panels, but only something that "appeared to be marijuana." The appellant's objection to the answer was sustained and there was no further pursuit of the question to determine whether the substance was tested or whether the officer was qualified to give an opinion concerning the contents of the bag.

Where a reasonable inference of a prior criminal record is present in the minds of the jurors, a new trial is required. *Commonwealth v. Allen,* 448 Pa. 177, 292 A. 2d 373 (1972). Therefore, the issue to be decided is whether the reference to marijuana in the context of this case was tantamount to the improper introduction of evidence of a prior criminal record by the Commonwealth and so prejudiced the jury as to deprive the appellant of a fair trial. We believe that the appellant is not entitled to a new trial as the reference to the marijuana, if erroneous, was harmless error. Error may be harmless if it is clear beyond a reasonable doubt that it did not affect the result. *Commonwealth v. Jones,* 233 Pa. Superior Ct. 52, 335 A. 2d 444 (1975). We have carefully reviewed the record in this case and find that there was sufficient evidence to sustain the conviction. A passing reference by the police officer to finding what appeared to be marijuana could not have determined the outcome of the case. We have considered the lack of cautionary instructions by the court and believe that such instructions were not required. The police officer did not state that he found marijuana, and cautionary instructions to the jury directing them to disregard any evidence of prior criminal convictions might well have confused the jury.

Reference to prior criminal activity by a defendant is not the type of error that always requires the grant of a new trial. Even where a witness stated that the defendant was "in jail before," the issue was not considered on appeal where no objection had been made at trial. *Commonwealth v. Smith*, 238 Pa. Superior Ct. 422, 357 A. 2d 583 (1976).

In order to necessitate a new trial, there must be a reasonable indication of prior criminal activity. In *Commonwealth v. Rivers*, 238 Pa. Superior Ct. 319, 357 A. 2d 553 (1976), a state policeman testified that the defendant "said he had done a lot of Federal time before." 238 Pa. Superior Ct. at 322. This Court granted a new trial and stated at pages 322-323: "As long as the jury can reasonably infer prior criminal activity from the evidence presented, prejudicial error has been committed." There is no doubt that the jury could reasonably infer prior criminal activity of a serious nature by one who has been sentenced by a federal court and has served time in a federal prison.

The dissenting opinion cites *Commonwealth v. Williams*, 230 Pa. Superior Ct. 72, 327 A. 2d 367 (1974) to support the requirement of an admonishment to the jury to disregard any testimony about prior offenses. In *Commonwealth v. Williams, supra*, the witness in telling why the defendant looked different to her stated: "Well, if a man is without drugs for nine days he may gain a little weight." 230 Pa. Superior Ct. at 74. The Court sustained an objection, but denied a mistrial. The judge also instructed the jury to totally disregard to answer. In *Commonwealth v. Williams, supra*, the witness gave her opinion as to why the defendant looked different and based it on her theory that he had stopped taking drugs for nine days and had therefore gained weight. In the instant case, the witness merely stated that he found a bag which appeared to contain marijuana. He also stated that he found other things including a gun and money in the same location. We find that the reference to marijuana was so brief that cautionary instructions were not required.

Appellant next contends that the search warrant which formed the basis of the search of December 19, 1973 was invalid and that the evidence seized pursuant to the warrant should have been suppressed. We find in the circumstances of this case, that the search warrant was sufficiently specific and the fact that it contained some inaccuracies does not vitiate the warrant. Judge Hoffman, in his dissenting opinion, fully discusses the issue of the validity of the search warrant and found it to be sufficient.

Appellant also contends that the court below erred when it stated in its charge that the jury could rightfully and correctly infer from the mere possession of the guns that the defendant had knowledge or reason to know that the guns were stolen. We have reviewed the charge, and nowhere do we find that the trial judge instructed the jury as appellant claims. The trial judge stated: ". . . you are permitted to draw from the facts which you find have been proven such reasonable and logical inferences as you may find from said proven facts. Of course, an inference is a process of reasoning by which a fact or a proposition sought to be established is deducted as a logical consequence or a state of facts already proved or admitted by the evidence." The charge did not instruct the jury that it could infer from the mere possession of the guns involved that the defendant knew or had reason to know that the guns were stolen.

Appellant also contends that the sentence was excessive. He argues that he received a greater sentence because he demanded a jury trial than he would have received had he entered a guilty plea. Even where a co-defendant receives a less severe sentence than a defendant, this is not a grounds for reversing

or reducing the defendant's sentence. *Commonwealth v. Stanton*, 239 Pa. Superior Ct. 47, 362 A. 2d 355 (1976). The trial court has broad discretion in imposing sentence. The sentence in this case was within the statutory limit and, therefore, appellate review is limited to those situations in which the lower court abused its discretion. *Commonwealth v. Ruza*, 238 Pa. Superior Ct. 9, 352 A. 2d 94 (1975). We find that the court below did not abuse its discretion in imposing sentence.

Judgment of sentence affirmed.

HOFFMAN, J., files a dissenting opinion in which CERCONE and SPAETH, JJ., join.

DISSENTING OPINION

IN THE SUPERIOR COURT
OF PENNSYLVANIA

J. 1036 (1975)

COMMONWEALTH OF PENNSYLVANIA,

v.

JOSEPH F. BIANCONE,

Appellant.

No. 1295 October Term, 1975

Appeal from Judgment of Sentence Imposed by Court of Common Pleas, Criminal Division, Berks County, to No. 753 and No. 753a of 1974.

Dissenting Opinion by Hoffman, *J.*: Filed Jun 29 1977

I would reverse appellant's conviction of receiving stolen property because the district attorney elicited testimony at trial that appellant had been in possession of marijuana at the time of the search.[1]

In September, 1968, Seward's Incorporated, a sporting goods store in Exeter Township, Berks County, was burglarized. At least thirty-four guns were taken, including a West Point Carbine 30-30, serial number Ad 14686. On September 30, 1972, a private residence in Greensburg, Westmoreland County, was burglarized and five pistols were reported missing.

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[1] Appellant also contends that his sentence was excessive because compared to individuals who pled guilty, his was considerably longer. Because I would reverse for a new trial, I do not discuss this argument.

On December 19, 1973, Trooper Pease of the Pennsylvania State Police submitted an affidavit for a search warrant to a district justice. The affidavit recites the following: ". . . [the affiant] has just and reasonable grounds for believing and does believe that the (3A) entire of the premises and the curtilage, consisting of a spring house and grounds of the premises known as (3B) Residence of Joseph . . . Biancone being a (3C) 2½ story stone and aluminum siding building located at (3D) Antietam Road in the (4) Township of Lower . . . Alsace is being used for the purpose of concealing" the proceeds of a recent burglary. Trooper Pease gave the warrant to Corporal McCreary to be executed. McCreary testified at trial that "[Pursuant to that warrant] I went to a residence along Angora Road in Alsace Township, Berks County."

The search conducted on December 19, uncovered between forty and fifty guns. The serial numbers of some of the weapons, including a West Point 30-30 caliber rifle, had been ground off. The rifle was forwarded to the State Police laboratory in Harrisburg, where the police chemist was able to restore the serial number. The police thereby discovered that the weapon was one taken in the 1968 burglary of Seward's sporting goods store.

McCreary also found a 410 shotgun pistol, recorded its serial number, but did not seize the weapon. He subsequently performed a computer check of the serial number and learned that the pistol was stolen. On December 20, he swore out a second search warrant for appellant's home. The warrant now recited the address as Angora Road. The 410 shotgun pistol was not found during the December 20 search.

On August 7, 1974, appellant was indicted on charges of Receiving Stolen Property and Aiding Consummation of a Crime. Appellant filed a motion to suppress on October 8,

1974, denied on the same day. Appellant was found guilty by a jury of both charges on October 22, 1974. Post-trial motions were denied and this appeal followed.

Appellant contends that the lower court erred in denying his motion for a mistrial after the assistant district attorney elicited testimony that the police search uncovered marijuana as well as weapons. During direct examination of Corporal McCreary, the following exchange took place:

> "Q. Did you make a search of the entire premises of Mr. Biancone's house?
> "A. Yes, sir.
> "Q. Will you tell us what else you saw and did in the course of that search?
> "A. During the course of the search, I had occasion to search a suspended ceiling, the new grid type of suspended ceiling, where there are metal grids suspended from the ceiling, and there are panels placed on top of those grids. I lifted up one of the panels and looked inside. In there, I found a 410 gauge shotgun pistol . . .
> "Q. Was anything else up there?
> "A. Yes, sir, there was.
> "Q. What?
> "A. There was a bag of what appeared to be marijuana."

It is apparent that the district attorney was soliciting the officer's testimony that appellant possessed contraband. Appellant's objection was sustained; but his motion for a mistrial was denied. Once the answer was offered, however, sustaining counsel's objection was of limited utility. No attempt was made by the court to give a curative instruction. *Cf. Commonwealth v. Martinolich*, 456 Pa. 136, ... A. 2d .... (1974); *Commonwealth v. Williams*, 230 Pa. Superior Ct. 72, ... A. 2d .... (1974).

In *Commonwealth v. Williams, supra*, the following dialogue took place: " 'Q. Were you able to identify the defendant at the preliminary hearing without anybody pointing to him or

pointing him out? A. I was able to identify him, although he did look different. Q. In what way? A. His hair was different and his face had begun to fill. Q. What do you mean by his face had begun to fill? A. Shall I really tell you what I meant? Q. Yes. A. Well, if a man is without drugs for nine days he may gain a little weight. [Defense counsel]: Objection. THE COURT: Objection sustained . . .' After denying the appellant's mistrial, the court instructed the jury as follows: 'THE COURT: Members of the jury, this lady has been talking to you about something she thinks happened, that he used narcotics. There is nothing in this case about that. That is something in her mind and we try cases on facts and the fact she had a theory as to why, to her, this man's face changed has nothing whatsoever to do with this case. Therefore, members of the jury, if as and when you are sent to the jury room you are to totally disregard that answer and not use it in any way in determining the final conclusion in this case . . .' 230 Pa. Superior Ct. at 74-75, ... A. 2d at ..... We held in *Williams* that such a vigorous admonishment to the jury was sufficient to cure any possible error that resulted from the witness's statement.

In general, however, "[i]t is a fundamental precept of the common law that the prosecution may not introduce evidence of the defendant's prior criminal conduct as substantive evidence of his guilt of the present charge." *Commonwealth v. Allen*, 448 Pa. 177, 181, ... A. 2d .... (1972). Our system of justice recognizes several exceptions to the above-stated rule: evidence of other criminal activity may be introduced "for the purpose of showing intent, guilty knowledge, motive, identity, plan, the accused to be one of an organization banded together to commit crimes of the nature charged, part of a chain of circumstances or one of a sequence of acts, or part of the natural developments of the facts, or mental condition, when insanity is a defense or, within limitations, for the purpose of fixing the penalty in murder cases." *Commonwealth v. Boulden*, 179 Pa. Superior Ct. 328, 336, ... A. 2d .... (1955). See also, *Commonwealth v. Heller*, 369 Pa. 457, ... A. 2d .... (1952); *Commonwealth v. Williams, supra.* If a reference to prior criminal activity is indirect, a court must decide "whether or not a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity . . . Once it is determined that the jury could reasonably conclude from the . . . reference prior criminal activity on the part of the defendant prejudicial error has been committed." *Commonwealth v. Allen, supra* at 181-82, ... A. 2d at .....

In the instant case, the testimony referred to appellant's possession of marijuana.[2] There is no question that possession of marijuana is criminal conduct. See Act of April 14, 1972, P.L. 233, No. 64, § 13; as amended; 35 P.S. § 780-113. Nor can it be argued that appellant's possession of marijuana comes within any of the relevant exceptions to the general rule that evidence of criminal activity is inadmissible. Therefore, it was error for the lower court to fail to admonish the jury or to grant appellant's motion for a mistrial.

Appellant also contends that the December 19 search warrant was defective so that evidence seized pursuant to the warrant should have been suppressed.

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[2] The lower court stated in its opinion that "reference to drug addiction of the accused does not necessarily carry with it the inference that the accused has engaged in prior criminal conduct." While it violates due process to punish an accused for a "status" rather than an action, *Robinson v. California*, 370 U.S. 600 (1962), there is no question that our system of justice permits the punishment of one in possession of contraband. The testimony in the instant case does not imply that appellant was an addict, but that he possessed marijuana.

Article I, § 8 of the Pennsylvania Constitution provides that ". . . no warrant shall issue without describing [any place or person to be seized] as nearly as may be . . ." In my view, the issue under § 8 is whether a warrant permits the search of only one clearly specified location. *Commonwealth v. Kaplan*, ... Pa. Superior Ct. ...., ... A. 2d .... (filed April 22, 1975), (HOFFMAN, J. concurring opinion); see also, *Commonwealth v. Muscheck*, ... Pa. ...., 334 A. 2d 248 (1975); *Commonwealth v. Smyser*, 205 Pa. Superior Ct. 599, ... A. 2d .... (1965).

From testimony at the suppression hearing, it is clear that appellant's residence was located on a country road, that there were no signs in the area to demark the various intersecting roads, and that the residence was near Antietam Road: "From Mount Penn you go down Carsonia Avenue and you would come to the intersection that about five roads come together, one is Friedensburg Road, one is Antietam Road, there is a side street that goes into Pennside, I don't know the name and another road that is blocked off, and you would have to take a left-hand turn and go onto Antietam Road. Then what you come onto first is a new section just built, it goes up the hill beside the dam, Antietam Lake. Up there it turns into a two-lane sort of bumpy road and winds around through the woods. There is another road up there, I don't know what the name of it is, that goes down through the woods, back down the hill—

"THE COURT: Wait a minute, to get to Biancone's you are going off of this new section onto a two-lane bumpy road—
"THE WITNESS: Also Antietam Road—
"THE COURT: Now from there—
"THE WITNESS: From there I think you only stay on the bumpy section about a quarter-mile or so and you have to make a left.

"[BY THE DISTRICT ATTORNEY]: When you make a left, is there a name to that road?
"A. I don't know what the name is. I don't recall ever seeing a road sign.
"Q. How far along on that left-hand-turn road does one proceed?
"A. I would say maybe a half or three-quarters of a mile, and that brings you out onto the road that goes by in front of Mr. Biancone's house . . . I don't recall ever seeing a road sign there. I know if it would not be blocked off, you would come out at an intersection of Antietam Road and Carsonia Avenue, but that road is blocked off. It used to run in front of Antietam Dam.
"Q. Are you indicating if you passed Mr. Biancone's home on the road you were at that time, you would come to the intersection of Antietam Road and—
"A. The new section of Antietam Road. I was under the impression that the new section of Antietam Road passed by Mr. Biancone's house—"

The description of the house was sufficiently detailed so that, in addition to the proximity to Antietam Road and to the fact that this was Mr. Biancone's residence in Lower Alsace Township, the house searched was the only place that could have been legally searched. *Cf. Commonwealth v. Kaplan, supra.*

Therefore, I would reverse appellant's conviction and remand for a new trial. I would not, however, suppress the evidence seized pursuant to the December 19 search warrant.

CERCONE and SPAETH, JJ., join this Dissenting Opinion.

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-842

JOSEPH F. BIANCONE,

Petitioner,

v.

PENNSYLVANIA.

UPON CONSIDERATION of the application of counsel for petitioner(*s*),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 21, 1978.

/s/ WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 6
day of April, 1978.